Ius Comparatum – Global Studies in Comparative Law

George A. Bermann *Editor*

# Recognition and Enforcement of Foreign Arbitral Awards

## The Interpretation and Application of the New York Convention by National Courts

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Volume 23

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ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-319-50913-6 ISBN 978-3-319-50915-0 (eBook)
DOI 10.1007/978-3-319-50915-0

Library of Congress Control Number: 2017948011



Printed on acid-free paper

This Springer imprint is published by Springer Nature
The registered company is Springer International Publishing AG
The registered company address is: Gewerbestrasse 11, 6330 Cham, Switzerland

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# Introduction

The international arbitration community takes pride in, and makes exceptionally good use of, the United Nations Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). This is no surprise, given the importance of international arbitration in the resolution of international disputes, and the acute dependence of international arbitration on the mobility of awards.

It was in consideration of the paramount importance of the Convention that the International Academy of Comparative Law commissioned a comparative study of the Convention's application and interpretation by the national courts of contracting States. Like most international treaties, the Convention is only as good as the use that can be, and is, made of it. And, again like most treaties, its efficacy depends on the will and the ability of national courts to act in compliance with it.

The present study does not reveal any pattern of deliberate departure from the letter or spirit of the Convention. The fact remains, however, that many of its provisions may be interpreted, in perfect good faith, in different ways. They may also be applied with different degree of rigor.

Gathering the experience of the courts of 44 different jurisdictions was a massive undertaking and, necessarily, a decentralized one, Its accomplishment would not have been possible without the sincere cooperation of national reporters who agreed to present their nation's understandings and practices regarding the Convention in accordance with a common questionnaire which identified, in the editor's opinion, some of the most important among the Convention's provisions about which varying interpretations could be expected to emerge. They performed this task admirably. At the same, it was necessary to offer assistance to them in ensuring that the information they provided took a form that permitted critical comparisons to be made and sound generalizations reached, where possible. It was also necessary to ensure that the stories the reporters had to tell could be well understood when rendered in English. These latter tasks required dedicated work over a long period by a team of talented Columbia Law School students, JD and LL.M. candidates alike. That work needed in turn to be carefully and thoughtfully coordinated, a task performed masterfully by Katharine Menendez de la Cuesta, Columbia JD, 2016.

It is my hope, as well as the hope of our reporters, our students and Katharine, in particular, that the present work brings real value to our understanding of the workings of an international instrument upon which the success of international arbitration in the resolution of international disputes so powerfully depends.

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George A. Bermann

# Interpretation and Application of the New York Convention in Indonesia

**Gatot Soemartono**

**Abstract** The interpretation and application of the New York Convention in Indonesia has been marked by certain peculiarities. These peculiarities stem from both case law and statute. This report provides a succinct analysis of the state of the New York Convention in Indonesia. More importantly, it delineates those areas where the courts in Indonesia have deviated significantly from accepted international standards or domestic statutory standards.

## 1 IMPLEMENTATION

### *1.1 Form of Implementation of the Convention into National Law*

On 29 August 1999, the Government of Indonesia enacted Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution ("New Arbitration Law").[1] This legislation is the current vehicle for the implementation of the New York Convention (the "Convention").

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[1] *Undang-Undang Nomor 30 Tahun 1999 tentang Arbitrase dan Alternatif Penyelesaian Sengketa*, published in the State Gazette of the Republic of Indonesia No. 138 of 1999 with its Elucidation published in the Supplement to the State Gazette of the Republic of Indonesia No. 3872 of 1999.

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G.A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards*,
Ius Comparatum – Global Studies in Comparative Law 23,
DOI 10.1007/978-3-319-50915-0_18

### *1.2 Declarations and/or Reservations Attached to the Instrument of Ratification*

On 5 August 1981, the Republic of Indonesia, by way of Presidential Decree No. 34 of 1981, ratified the Convention. Indonesia's subsequent accession to the Convention was subject to two reservations.[2] Firstly, Indonesia would apply the Convention on a reciprocal basis, meaning it would recognize and enforce arbitral awards made in the territory of only another contracting state. Secondly, it would recognize and enforce foreign arbitral awards only in relation to disputes that arose from legal relationships, whether contractual or not, considered commercial under Indonesian law.

The relationship between the Convention and Presidential Decree No. 34 of 1981 was considered in *PT Nizwar v Navigation Maritime Bulgars Varna*.[3] In this case, a writ of execution was sought from the Supreme Court to enforce a foreign arbitral award. The Supreme Court refused to issue a writ of execution on the ground that there were no implementing regulations for Presidential Decree No. 34 of 1981. It held that "even though Indonesia has ratified the New York Convention, it is not bound by the provisions yet." This decision was widely criticized for its excessive rigidity in relation to the interpretation of Presidential Decree No. 34 of 1981.[4] The debate centered on whether the Convention is a self-executing convention for Indonesia, so as to directly recognize and enforce any foreign arbitral award without delay.[5]

To put an end to the uncertainty surrounding the enforcement of foreign arbitral awards in Indonesia the Supreme Court issued Regulation No. 1 of 1990 (the "Regulation").[6] The Regulation detailed both the criteria and the procedures for enforcing foreign arbitral awards in the country. Foreign arbitral awards will only be recognized and enforced within the jurisdiction of the Republic of Indonesia if they meet the following conditions:[7] (1) the awards must have been rendered by a tribunal in a country which, together with Indonesia, is a party to a bilateral or multilateral convention concerning a reciprocal recognition and enforcement of foreign arbitral awards; (2) the awards are limited to a cause of action which, under the provisions of Indonesian law, falls within the scope of commercial law; and (3) the

[2] "Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Indonesia acceded to the Convention on 7 October 1981 and the Convention came into force in Indonesia on 5 January 1982.

[3] Decision of the Supreme Court No. 2944/K/Pdt/1983 issued on 20 August 1984.

[4] N Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia" (2005) 20 *American University International Law Review* 359, 368, stating that "[a]rbitration scholars around the world denounced the ruling…"

[5] Yahya Harahap, *Arbitrase* (Jakarta, Sinar Grafika, 2004) 32 [translated by author].

[6] The Supreme Court Regulation No. 1 of 1990 concerning the Procedure of the Enforcement of Foreign Arbitral Award, issued on 1 March 1990.

[7] Article 3 of the Regulation.

awards shall not contravene Indonesian law or violate public order or public policy.

The Regulation also lays down the procedure for enforcement of foreign arbitral awards, commenced by registering an application with the office of the Registrar of the Central Jakarta District Court. The application must be accompanied by the following documents:[8] firstly, the original foreign arbitral award or its authenticated copy, together with an official translation of the text in the Indonesian language; secondly, the original agreement, or its authenticated copy, on which the foreign arbitral award was based, together with an official translation of the text in the Indonesian language; and thirdly, a statement from the diplomatic representative of the Republic of Indonesia in the country where the foreign arbitral award was rendered, stating that this country and Indonesia are bound by a bilateral or multilateral treaty on the recognition and implementation of foreign arbitral awards. Subsequently, within 14 days the District Court must submit the application to the Supreme Court. The Supreme Court will then issue a writ of execution that must be enforced by the Central Jakarta District Court or other lower courts having jurisdiction over the matter.

## *1.3 Definition of "Arbitral Award" and "Foreign Arbitral Award"*

The New Arbitration Law does not define an "arbitral award." However, it does define an "international arbitration award" in Art 1, point 9 of the General Provisions as "an award made by an arbitration institution or individual arbitrator(s) outside of the territorial jurisdiction of the Republic of Indonesia, or an award made by an arbitration institution or individual arbitrators(s) which in accordance with the provisions of Indonesian law is deemed to be an international arbitration award."

This definition addresses the scope of international awards referring to the place of arbitration, which should not be in the territory of Indonesia. Nevertheless in *Pertamina v PT Lirik Petroleum*,[9] the Supreme Court affirmed an award rendered in Jakarta under the rules of the International Court of Arbitration of the International Chamber of Commerce (ICC) as an international arbitral award. Even though Jakarta was the arbitral seat, the Supreme Court seemed to take the view that the award was a foreign arbitral award because the arbitration was conducted under the ICC Rules. The Supreme Court upheld the district court decision, which based its judgment on the ground that the ICC is a foreign, Paris-based arbitral institution. It can be safely concluded that the courts have departed from the express territorial definition of international arbitral award as stipulated in the New Arbitration Law.

[8] Article 5 of the Regulation.

[9] Decision of the Supreme Court No. 904 K/Pdt.Sus/2009, 9 June 2010. See also decision of the Central Jakarta District Court No. 01/Pembatalan Arbitrase/2009/PN.Jkt.Pst., 3 September 2009.

### *1.4 Measures of Provisional Relief Ordered by Arbitral Tribunal as "Awards"*

The New Arbitration Law empowers an arbitral tribunal to issue an order for provisional relief in the form of a provisional or interim award. Art 32(1) of the New Arbitration Law states that "[a]t the request of one of the parties, the arbitral tribunal may render a provisional award or other interim awards to regulate the manner of the hearings, including granting the attachment of assets, ordering the deposit of goods to a third party or the sale of perishable goods."[10] It is clear from this provision that an order for provisional relief issued by an arbitral tribunal must take the form of a provisional or interim award that requires parties to take certain steps awaiting conclusion of the arbitration proceedings. However, unlike court orders that can be enforced through the Civil Procedural Law, such provisional or interim awards are not subject to a particular procedure for enforcement. This situation raises a serious doubt as to the effectiveness of a tribunal's order for interim relief. Furthermore, such provisional or interim awards are not considered as "arbitral awards" within the ambit of the Convention in Indonesia, and thus, such awards are not enforceable under the Convention. In addition, the New Arbitration Law does not address the issue of interim relief granted by courts in support of arbitration.

### *1.5 Alternatives to Convention as Means of Obtaining Recognition or Enforcement of a Foreign Award*

Parties cannot rely on any means other than the Convention, when they seek recognition and/or enforcement of foreign arbitral awards in Indonesia. Additionally, pursuant to the reciprocal principle stipulated in Presidential Decree No. 34 of 1981, only arbitral awards made in the territory of another contracting state can be recognized and enforced in Indonesia.

[10] Art 32(1) of the New Arbitration Law.